No. 80-1974

Supreme Court, U.S.
FILED
MAY 22 1981
ALEXANDER L. STEVAS,
CLERK

In the Supreme Court of the United States

OCTOBER TERM 1981

THOMAS WHITTY,

Petitioner,

vs.

THOMAS R. ISRAEL, Warden, State Prison of Waupun, Wisconsin; and the ATTORNEY GENERAL of the State of Wisconsin,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

ROBERT E. SUTTON
1409 East Capitol Drive
Milwaukee, Wisconsin 53211
Attorney for Petitioner

UNITED STATES LAW PRINTING CO., CHICAGO, ILLINOIS 60618 (312) 525-6581

QUESTION PRESENTED FOR REVIEW

Was the identification procedure consisting of a one-on-one confrontation between the petitioner-defendant and an eleven year old boy, some two hours after the alleged assault, a violation of the constitutional rights of the petitioner?

INDEX

PAGE

Question Presented For Review i

Opinion Below 1

Jurisdiction 2

Constitutional Provisions And Statutes 2

Statement Of The Case 2

Reasons For Granting The Writ 4

I. The One-On-One identification Procedure Whereby The Petitioner Was Identified By An Eleven Year Old Boy As His Assailant In A Sexual Assault Was, Under All The Attendant Circumstances, Unnecessary, Suggestive, Contaminated The Subsequent In Court Identification, And Was An Unconstitutional Violation Of The Petitioner's Right To Due Process Of Law 4

II. The Decision Of The Court Of Appeals Misread *Manson* v. *Brathwaite*, 432 U.S. 98 (1977) And Misapplied It To The Facts In The Case At Bar 9

III. The Failure Of The Trial Court To Furnish Standard Instructions To The Jury Regarding Identification Testimony Compounded The Constitutional Error 12

Conclusion 14

Appendix:

A—Order Of The United States Court Of Appeals For The Seventh Circuit ..... App. 1-5

B—Order Of The United States District Court For The Eastern District of Wisconsin ..... App. 6-8

AUTHORITIES CITED

Cases Cited

PAGE

Fells v. State, 65 Wis.2d 525, 223 N.W.2d 507 (1974) .. 4

Gilbert v. California, 388 U.S. 263, 18 L.Ed.2d 1178, 87 S.Ct. 1951 (1967) 4

Hampton v. State, 92 Wis.2d 450, 285 N.W.2d 868 (1979) 12

Jones v. Wisconsin, 422 F.Supp. 1148 (E.D. Wis. 1976) 4

Manson v. Brathwaite, 432 U.S. 98, 53 L.Ed.2d 140, 97 S.Ct. 2243 (1977) 5, 6, 9

Martin v. State of Indiana, 521 F.2d 682 (7th Cir.) 9

Moore v. Illinois, 434 U.S. 220, 54 L.Ed.2d 424, 98 S.Ct. 458 (1977) 4, 10

Neil v. Biggers, 409 U.S. 188, 34 L.Ed.2d 401, 93 S.Ct. 375 (1972) 4, 6, 9

Rudd v. State of Florida, 477 F.2d 805 (5th Cir. 1973) 5

Stovall v. Denno, 388 U.S. 293, 18 L.Ed.2d 1199, 87 S.Ct. 1967 (1967) 4, 5

United States v. Crews, 445 U.S. 463, 63 L.Ed.2d 437 fn. 17 at p. 457, 100 S.Ct. 1244 (1980) 10, 11

United States ex rel. Choice v. Brierley, 363 F.Supp. 178 (1973 D.Ct. Pa.) 4

U.S. v. Grose, 525 F.2d 1115 (7th Cir. 1975) 9

Wade v. United States, 388 U.S. 218, 18 L.Ed.2d 1149, 87 S.Ct. 1926 (1967) 4, 9

Watkins v. Sowders, 66 L.Ed.2d 549, 101 S.Ct. (1981) 12

Constitution and Statutes

PAGE

Sixth Amendment to the United States Constitution 2, 4

Fourteenth Amendment to United States Constitution 2, 4, 5

28 U.S.C. Sec. 1254(1) 2

28 U.S.C. Sec. 2254 2

In the Supreme Court of the United States

OCTOBER TERM 1981

NO.

THOMAS WHITTY,

Petitioner,

VS.

THOMAS R. ISRAEL, Warden, State Prison of Waupun, Wisconsin; and the ATTORNEY GENERAL of the State of Wisconsin,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the order of the United States Court of Appeals for the Seventh Circuit entered on February 24, 1981.

OPINION BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit was filed on February 24, 1981 and is set forth in the Appendix, pp. 1-5. The decision of the United States District Court for the Eastern District of Wisconsin was entered on September 19, 1979 and is set forth in the Appendix, pp. 6-8.

JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This case involves the Sixth and Fourteenth Amendments to the Constitution of the United States and 28 U.S.C. Sec. 2254.

STATEMENT OF THE CASE

Between 11:00 p.m. and 12:00 midnight on April 9, 1977 police were called to the residence of Mr. and Mrs. Frank Bauer, an apartment located over a bar in Delavan, Wisconsin. Upon arrival the police were advised that Frank Bauer, Jr., an eleven year old boy, claimed to have been sexually assaulted in his bedroom at approximately 11:00 p.m. Other than the boy, there were no witnesses to the alleged assault. Under questioning as to the identity of the assailant, Frank Bauer claimed it was a "Mr. Woody". Frank's sister corrected him and advised that it was a Mr. Whitty. She then volunteered to show the police where Mr. Whitty lived and the police went to the defendant's house some blocks from the Bauer residence. At approximately 2:20 a.m. on April 10, 1978 the defendant was transported in a police squad car to a parking lot across the street from the Bauer residence and for identification purposes the boy confronted the defendant sitting in the police car. He identified the defendant as the assailant.

Based upon the confrontation a complaint and information charging the defendant with sexual assault and burglary was filed. An evidentiary hearing directed to the

issue of the one-on-one confrontation was held on August 8, 1978. The motion to suppress the testimony was denied and trial was held before a jury on March 14-16, 1978. On March 16, 1978 the defendant was convicted and on August 2, 1978 the trial court denied a motion for new trial based inter alia upon the confrontation issue. The conviction was affirmed on February 8, 1978 on appeal to the Court of Appeals of Wisconsin and a petition to appeal therefrom was denied by the Wisconsin Supreme Court on May 8, 1978. On May 25, 1979 appellant filed a petition for habeas corpus with the District Court for the Eastern District of Wisconsin and on September 21, 1979 the Court denied the petition. From that denial an appeal was taken to the Circuit Court of Appeals for the Seventh Circuit. On February 24, 1981 the Seventh Circuit entered its order affirming the decision of the District Court. From that order the instant petition for certiorari has been filed.

REASONS FOR GRANTING THE WRIT

I.

THE ONE-ON-ONE IDENTIFICATION PROCEDURE WHEREBY THE PETITIONER WAS IDENTIFIED BY AN ELEVEN YEAR OLD BOY AS HIS ASSAILANT IN A SEXUAL ASSAULT WAS, UNDER ALL THE ATTENDANT CIRCUMSTANCES, UNNECESSARY, SUGGESTIVE, CONTAMINATED THE SUBSEQUENT IN COURT IDENTIFICATION, AND WAS AN UNCONSTITUTIONAL VIOLATION OF THE PETITIONER'S RIGHT TO DUE PROCESS OF LAW.

Through a series of landmark cases the United States Supreme Court has established principles governing lineups and confrontations between victims and suspects and under what circumstances such confrontations violate the Sixth and Fourteenth Amendments. *Wade* v. *United States,* 388 U.S. 218, 18 L.Ed.2d 1149, 87 S.Ct. 1926 (1967); *Gilbert* v. *California,* 388 U.S. 263, 18 L.Ed.2d 1178, 87 S.Ct. 1951 (1967); *Stovall* v. *Denno,* 388 U.S. 293, 18 L.Ed. 2d 1199, 87 S.Ct. 1967 (1967); *Neil* v. *Biggers,* 409 U.S. 188, 34 L.Ed.2d 401, 93 S.Ct. 375 (1972).

An analysis of those cases leads to the conclusion that single suspect confrontations are to be scrutinized very carefully and are to be avoided absent exigent circumstances. *United States ex rel. Choice* v. *Brierley,* 363 F.Supp. 178 (1973 D.Ct. Pa.); *Jones* v. *Wisconsin,* 422 F.Supp. 1148 (E.D. Wis. 1976) and *Fells* v. *State,* 65 Wis.2d 525, 223 N.W.2d 507 (1974).

Due process is denied when a confrontation is unnecessarily suggestive and conducive to an irreparably mis-

taken identification. *Moore* v. *Illinois,* 434 U.S. 220, 54 L.Ed.2d 424, 98 S.Ct. 458 (1977). The practice of showing suspects singly to witnesses for identification is generally condemned as unreliably suggestive. *Stovall* v. *Denno, supra; Rudd* v. *State of Florida,* 477 F.2d 805 (5th Cir. 1973).

The suggestive nature of the confrontation in the case at bar can clearly be seen from the transcript of the evidentiary hearing and the trial. It must be remembered that the victim was an eleven year old boy. The testimony given by him and the officers was not in conflict and clearly established that the identification was accompanied by leading and suggestive questioning of the boy. (See Evidentiary Hearing Transcript, pp. 7-14, 16-19 and 21-31).

There were no exigent circumstances that required an immediate confrontation by the alleged victim. Certainly a lineup with reasonable safeguards—at least the presence of other civilians in the lineup—could have been arranged within the ensuing hours. In *Manson* v. *Brathwaite,* 432 U.S. 98, 53 L.Ed.2d 140, 97 S.Ct. 2243 (1977) the Court stated that the standard of judging one-on-one confrontations is that of fairness as required by the Due Process Clause of the Fourteenth Amendment. Certainly, defendant was not afforded fairness in being denied the opportunity to be seen in a lineup.

In view of the suggestive statements which had been made to the victim by his sister (See pp. 29-33, transcript of the Evidentiary Hearing and pp. 110-112, 126, 130-136 of the trial) it is impossible to remove the impediment to the identification and declare that the in court identification was not contaminated by the suggestive confrontation. The procedure of asking the boy "Is that Mr. Whitty" is an unnecessarily suggestive confrontation.

In *Manson* v. *Brathwaite, supra,* the United States Supreme Court held that an unnecessarily suggestive confrontation was admissible if under the totality of the circumstances the identification was reliable. In determining whether the identification was reliable the court reiterated the factors expounded in *Neil* v. *Biggers, supra.* The *Manson* Court stated that the factors in *Neil* v. *Biggers* are to be weighed against the corrupting effect of the suggestive identification itself. Petitioner contends that the unnecessarily suggestive confrontation far outweighs reliability of the identification.

The following factors are to be assessed in determining whether the identification is reliable:

1. The witness's opportunity to view the criminal at the time of the crime;

2. The degree of attention with which the witness observed the criminal;

3. The accuracy of any description given prior to the confrontation;

4. The level of certainty the witness demonstrated at the confrontation;

5. The length of time between the crime and the confrontation.

The facts of the instant case, considered under the *Manson* and *Neil* factors, strongly support the conclusion that the identification was not reliable.

1. OPPORTUNITY TO VIEW THE ASSAILANT

Frank Bauer did not have a clear opportunity to view his assailant. His mother testified that on the night of the alleged attack his room was dark. In Frank Bauer's testimony he stated that there was no light in the room. The

only light which came into the room was from a vapor light outside his window. The window also had a shade covering it which further reduced the amount of light which came from the vapor light. Hence, Frank Bauer's opportunity to view the assailant was dubious at best. (See pp. 71-73, 83, 108 of the Trial Transcript).

2. DEGREE OF ATTENTION

Frank Bauer testified that he was asleep at the time of the alleged attack. He was awakened by a person in his room and was still half asleep. There is nothing in the record to support a conclusion that Frank Bauer scrutinized his assailant closely. The fact that the boy was half asleep throws considerable doubt of his degree of attention and the reliability of his identification. (See pp. 116-117 of the Trial Transcript).

3. ACCURACY OF DESCRIPTION

Frank Bauer did not give a physical description of his assailant which could subsequently be checked against Whitty's actual appearance. The only way that Frank Bauer recognized Mr. Whitty was through the suggestive conversation with his sister. His sister was the person who identified "Mr. Whitty" when Frank Bauer referred to the attacker as "Tom Woody". His sister also referred to Mr. Whitty as a "queer" which certainly must have influenced Frank Bauer in identifying Whitty as his alleged attacker. Frank Bauer's failure to give a physical description leaves in doubt whether his entire identification of Mr. Whitty was no more than a by-product of a series of suggestive confrontations. This lack of any description weighs heavily against the admission of such a suggestive identification of Mr. Whitty. (See pp. 130-131,

134-135, 142-143, 155, 111 of the Trial Transcript). The only description Frank Bauer gave of his assailant was that he had black fluffy hair, but Frank Bauer later admitted that he knew Mr. Whitty had black hair because his sister had told him that even before the night of the alleged assault. (See pp. 134-135 of the Trial Transcript).

4. LEVEL OF CERTAINTY

During the confrontation, Frank claimed that he was certain that Whitty was the man who attacked him. The question remains whether this certainty was a result of suggestive statements made to Frank Bauer by his sister and the police. It is a reasonable inference that an 11 year old boy at 2:20 in the morning would be influenced by suggestions made by the police and his sister. Since Frank Bauer gave no physical description of his assailant, it is likely that his level of certainty was due to the suggestive statements made by those around him. (See p. 132 of the Trial Transcript).

5. TIME BETWEEN CRIME AND CONFRONTATION

The confrontation took place within three hours of the assault, but the place of confrontation was less than adequate. The confrontation took place in a parking lot while Mr. Whitty was sitting in a police car. First of all, the lighting was poor because the only lights on were the dome lights of the police car and some street lights. It must have been difficult for Frank Bauer to get a clear view of Mr. Whitty. Also it was late at night and Frank Bauer was undoubtedly sleepy and upset. (See Evidentiary Hearing Transcript, pp. 25-27, 35-37, 105, 130-133). Under these circumstances, the best and fairest method of identification would have been to put Mr. Whitty in a lineup the following morning.

An analysis of the foregoing factors illustrates that the identification by Frank Bauer was not reliable. The corruptive effect of the suggestive identification itself outweighs the analysis of the factors pointing to reliability. Hence, defendant was deprived of his constitutional right by the identification utilized.

The burden is upon the State to demonstrate by clear and convincing evidence that the prior confrontation neither irreparably affected the witness recollection of the criminal, nor permanently tainted his capacity to make an identification based solely upon his original observations. *Wade* v. *United States, supra; U.S.* v. *Grose,* 525 F.2d 1115 (7th Cir. 1975); *Martin* v. *State of Indiana,* 521 F.2d 682 (7th Cir.). The State has failed to present evidence showing that the suggestive confrontation did not permanently taint Frank Bauer's capacity to make an identification based solely upon his original observations. The State mainly argued that the confrontation was not unnecessarily suggestive. Petitioner submits that the confrontation was clearly suggestive and that the State has failed to carry its burden of proof on the issue of reliability. The State has not presented any "clear and convincing" evidence that the suggestive statements made to Frank Bauer did not taint his capacity to make an identification based on his original observations.

II.

THE DECISION OF THE COURT OF APPEALS MISREAD MANSON v. BRATHWAITE, 432 U.S. 98 (1977) AND MISAPPLIED IT TO THE FACTS IN THE CASE AT BAR.

Admittedly, since *Manson* v. *Brathwaite, supra* and *Neil* v. *Biggers, supra* "reliability" is the linchpin of identification admissibility. It appears clear, however,

that there was no intent by the Supreme Court to abandon the principles of *Wade-Gilbert-Stovall.* One-on-one confrontations are particularly to be viewed as conducive to unreliable identification. *Moore* v. *Illinois,* 434 U.S. 220, 54 L.Ed.2d 424 at p. 434, 98 S.Ct. 458 (1977).[1] *United States* v. *Crews,* 445 U.S. 463, 63 L.Ed.2d 437 fn. 17 at p. 457, 100 S.Ct. 1244 (1980).

The concept to reliability should not be presumptive or a rubber stamp process which effectively destroys the underlying principles. The factors recited in *Manson* should certainly be considered in the context of the facts of *Manson.* The identifying party in *Manson* was not a child who was identifying an assailant but rather was a trained police officer who had furnished a detailed description of the defendant and ultimately made a "no doubt" identification in court. Mr. Justice Blackman reviewed in detail the surrounding circumstances of the *Manson* identification and weighed all of the factors including, inter alia, the officer's opportunity to view the defendant, the degree of attention, the accuracy of the description, the level of certainty, the time between the crime and the confrontation and the fact that there was no coercive pressure to make an identification *arising from the presence of another.* See 53 L.Ed.2d 140 at 155. Those facts contrast completely with the facts in the instant case. In the case at bar the identifying party was not a trained police officer but was an eleven year old child. Most importantly, the identity of the petitioner had been suggested to the child before

[1] That the identification in this case was held to be "reliable" and not to have infected the trial testimony is an indication that perhaps the time for reevaluation and reconsideration of the *Wade-Gilbert* rule noted by Mr. Justice Rehnquist in his concurring opinion in *Moore,* may have come.

the confrontation and was suggested to him during the confrontation. To claim, as the opinion of the Court of Appeals does, that the *Manson* tests are met on the facts of the instant case is to completely ignore the underlying rationale of *Manson*.[2]

It is respectfully submitted that the Court of Appeals selectively abstracted facts to support "reliability" and ignored facts that clearly undermined "reliability". For example, the boy was asleep at the time he claimed the assault commenced, it was late at night and the only light in the room during the incident was purportedly furnished from outside the house and the family watch dog was in the room next to the assault yet apparently did not become aroused or cause any disturbance. Those factors should reasonably challenge the identification rather than support it.[3]

Under all the attendant circumstances the one-on-one confrontation in the case at bar was "unreliable" under the applicable standards.

---

[2] It is of note that Mr. Justice Marshall and Mr. Justice Brennan were of a view that even the *Manson* circumstances were insufficient to avoid the *Wade-Gilbert* violation.

[3] In *United States* v. *Crews*, 63 L.Ed.2d 537 at fn. 18, p. 547 the Court noted "we attach particular significance to the following circumstances which support the trial court's determination in this case: The victim viewed her assailant at close range . . . under excellent lighting conditions . . . respondent closely matched the description given by the victim immediately after the robbery . . . twice selected respondent without hesitation in non-suggestive pretrial identification procedures . . ."

III.

THE FAILURE OF THE TRIAL COURT TO FURNISH STANDARD INSTRUCTIONS TO THE JURY REGARDING IDENTIFICATION TESTIMONY COMPOUNDED THE CONSTITUTIONAL ERROR.

The opinion of the Court of Appeals dismissed the issue of the failure of the trial court to instruct re identification testimony on the grounds that the cases which require such an instruction were based on the supervisory powers of the federal courts rather than on the Constitution. See footnote*. The importance of jury instructions on the issue of identification testimony is discussed in both the majority and dissenting opinions of *Watkins* v. *Sowders*, 66 L.Ed.2d 549, 101 S.Ct. (1981). In the majority opinion Mr. Justice Stewart states:

> "And the proper evaluation of evidence *under the instructions of the trial judge* is the very task our system must assume jurys can perform." [Emphasis supplied]

Certainly the failure of the trial judge to furnish appropriate instructions would subvert that task. This is particularly true where the case turns on the identification testimony of a single witness. *Hampton* v. *State*, 92 Wis.2d 450, 285 N.W.2d 868 (1979). As Justice Abrahamson notes in the concurring opinion in *Hampton* v. *State*:

> "A special identification instruction is needed because identification testimony is at one and the same time notably convincing and notably fallible. Within recent months, newspapers across the country reported the case of a priest who was mistakenly identified as the perpetrator of the crime. In United States v. Telfaire, 469 F.2d 552 (D.C. Cir. 1972), the court explained the problem of mistaken identification and the

need for a special instruction when identification is a key issue as follows:

'The presumption of innocence that safeguards the common law system must be a premise that is realized in instruction and not merely a promise. In pursuance of that objective, we have pointed out the importance of and need for a special instruction on the key issue of identification, which emphasizes to the jury the need for finding that the circumstances of the identification are convincing beyond a reasonable doubt. This need was voiced in 1942 in McKenzie v. United States and it has been given vitality in our opinions of recent years—following the Supreme Court's 1966 Wade-Gilbert-Stovall trilogy focusing on the very real danger of mistaken identification as a threat to justice. We refer to our post-Wade opinions in Gregory and Macklin. These opinions sought to take into account the traditional recognition that identification testimony presents special problems of reliability by stressing the importance of an identification instruction even in cases meeting the constitutional threshold of admissibility.' " (Footnotes omitted)

It is respectfully submitted that under the circumstances of the case at bar the failure of the trial judge to furnish an appropriate instruction was an error of constitutional dimension.

CONCLUSION

For the reasons stated above certiorari should be granted and the decision of the United States Court of Appeals for the Seventh Circuit dated February 24, 1981 should be reversed.

Dated this 18th day of May, 1981.

Respectfully submitted,

ROBERT E. SUTTON
Attorney for Petitioner

P.O. Address:
1409 East Capitol Drive
Milwaukee, Wisconsin 53211
(414) 961-0802

APPENDIX

APPENDIX A

March 2, 1981

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

Submitted February 10, 1981*

February 24, 1981

Before
Hon. LUTHER M. SWYGERT, Circuit Judge
Hon. WALTER J. CUMMINGS, Circuit Judge
Hon. WILLIAM J. BAUER, Circuit Judge

No. 79-2267

THOMAS WHITTY,

Petitioner-Appellant,

vs.

THOMAS R. ISRAEL, Warden, State Prison of Waupun, Wisconsin; and the ATTORNEY GENERAL of the State of Wisconsin,

Respondents-Appellees.

Appeal from the United States District Court
for the Eastern District of Wisconsin.
No. 79-C-363
MYRON L. GORDON, *Judge*.

---

* After preliminary examination of the briefs, the court notified the parties that it had tentatively decided that oral argument was unnecessary. The notice provided that any party could file a

(footnote continued)

ORDER

Petitioner-appellant Thomas Whitty appeals from a denial of his petition for a writ of habeas corpus. In his petition Whitty alleged that the identification procedure utilized by the police violated his right to due process.

I.

Whitty was convicted of first degree sexual assault and burglary. The victim of the assault, Frank Bauer, an 11 year-old boy, testified that Whitty entered his room on the night of April 9, 1977. Whitty asked Frank if there was any money in the house, to which Frank responded in the negative. Whitty then made several threatening statements to Frank.

Whitty then asked Frank if he could kiss him and have sex with him. Frank refused but in spite of the refusal Whitty proceeded to kiss Frank and perform fellatio on him. Whitty was in Frank's room fifteen to thirty minutes. There was no light on in the room but the room was illuminated by a vapor light from a parking lot outside.

Frank's mother was not at home at the time of the assault. When she returned, Frank told her about the incident and she called the police. The police arrived and

---

(footnote continued)

"Statement as to Need of Oral Argument." *See* Fed. R. App. P. 34(a); Circuit Rule 14(f). The appellant filed such a statement. Upon consideration of the briefs, the record, and the statement, the appeal is submitted for decision without oral argument. The appellant's statement concerns the necessity of an instruction on the matter of identification evidence. Cases which require such an instruction are not based on the Constitution but the supervisory power of federal courts. *United States* v. *Hodges*, 515 F.2d 650 (7th Cir. 1975); *United States* v. *Telfaire*, 469 F.2d 552 (D.C. Cir. 1972).

asked Frank who assaulted him. Frank responded, "Tom Woody." Frank's sister, Susan, said, "Oh, you mean Mr. Whitty."

Prior to the assault Frank had seen Whitty ten or twenty times and had talked to him the same number of times. These conversations took place at a go-kart park which Whitty managed or at a grocery store where Whitty worked.

The police went to Whitty's home and informed him of the incident. The police suggested that the matter could be cleared up by having Frank attempt to identify Whitty. Whitty agreed.

The police took Whitty in a police car to a parking lot near Frank's home. The light in the car was on and the vapor lights of the parking lot also illuminated the scene. Frank viewed Whitty while Whitty was in the police car and identified Whitty as his assailant. Frank said that he was one hundred percent certain of the identification.

At trial Frank made two in-court identifications of Whitty.

II.

Even if an inherently suggestive identification procedure is utilized, the identification is admissible if it is reliable.[1] *Manson* v. *Braithwaite,* 432 U.S. 98 (1977). Reliability is the linchpin of the analysis.

Several factors are significant in determining the reliability of the identification: (1) the witness' opportunity to view the defendant at the time of the crime, (2) the degree of attention with which the witness observed the

---

[1] We have proceeded to discuss the issue of reliability on the assumption that the show-up was suggestive.

criminal, (3) accuracy, of the description given by the witness, (4) the witness' level of certainty of the identification, (5) the time between the crime and the confrontation. *Manson*, 432 U.S. 114-15. *See also Neil* v. *Biggers*, 409 U.S. 188, 199-200 (1972). *United States of America* v. *Phillips*, No. 80-1185 (Feb. 6, 1981) slip op. at 11.

The facts of this case, analyzed in light of these factors, convince us that the identification was reliable. Frank had an adequate opportunity to view his assailant. The light from outside the window provided some light. *Cf. Israel* v. *Odom*, 521 F.2d 1370, 1375 (7th Cir. 1975) (light provided by street light and light from another room allowed opportunity to view assailant prior to sunrise).

There can be no doubt that as the victim of the offense Frank's degree of attention cannot be seriously disputed. As the victim of this crime, Frank paid more attention than would a person who merely happened to be in the vicinity of a crime. *Neil* v. *Biggers*, 409 U.S. at 200 ("She was no casual observer but rather the victim of the most personally humiliating of all crimes."); *Israel*, 521 F.2d at 1375 (also discussing degree of attention of rape victim).

In regard to the accuracy of the description, Frank knew his assailant and named him as well as his assailant's place of residence. *Pruitt* v. *Hutto*, 574 F.2d 956, 957 (8th Cir.), *cert. denied sub nom*, 439 U.S. 870 (1978) (victim of rape named brother-in-law as her assailant). Frank knew Whitty personally and had seen and spoken to him on many occasions.[2]

---

[2] Whitty emphasizes that Frank named "Tom Woody" as his assailant. This mispronunciation does not undercut the reliability of Frank's identification. Indeed, if anything it buttresses the identification. The similarity of the sounds in "Woody" and "Whitty" are self-evident, and Frank used his assailant's correct first name.

As to the level of certainty, Frank stated that he was certain that Whitty was the man who molested him.

Finally, the confrontation occurred only three hours after the assault. This was certainly a time when the incident was in Frank's memory. *Manson*, 432 U.S. at 117 (identification made within two days); *Israel*, 521 F.2d at 1376 (confrontation occurred within 48 hours of crime).

In light of all these factors we conclude that the identification was reliable. The judgment of the district court is affirmed.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

THOMAS WHITTY,

Petitioner

v. No. 79-C-363

THOMAS R. ISRAEL, Warden,
et al.,

Respondents.

DECISION and ORDER

Thomas Whitty has petitioned this court pursuant to 28 U.S.C. § 2254 for a writ of habeas corpus. For the reasons which follow, the petition will be denied.

Mr. Whitty's sole claim in his petition is that his conviction in state court for burglary and sexual assault was unconstitutional because an allegedly illegal out-of-court identification was admitted into evidence during his trial. The pertinent facts with regard to the identification of Mr. Whitty are as follows:

On the evening of April 9, 1977, eleven year old Frank Bauer was sleeping in his parents' apartment in the town of Delavan. Frank testified that he awoke to find a person, who he later identified as Mr. Whitty, kneeling by his bed. Mr. Whitty allegedly asked Frank if there was any money in the house. When Frank said no, Mr. Whitty allegedly threatened to kill him if he was lying.

Frank further testified that Mr. Whitty then asked him if he could kiss and suck him. Despite the boy's refusal,

Mr. Whitty allegedly kissed Frank on the mouth and placed his mouth on the boy's penis. Although there were no lights on in the room, Frank testified that he could see the man because the window shade allowed light from a vapor light in a parking lot outside to enter the room. The entire incident lasted from 15 to 30 minutes, and the boy testified that he was fully awake.

After his assailant left, Frank ran into his sister's room and told her what happened. A short time later, the police arrived. In response to police questions, Frank identified his assailant as "Tom Woody." When his sister suggested that he meant "Tom Whitty," he agreed that Whitty was the correct name. Frank testified that prior to the assault he had seen Mr. Whitty 10 to 20 times and had talked to him 10 to 15 times.

Approximately three hours after the sexual assault of Frank Bauer occurred, the police drove the petitioner in a squad car to a parking lot across the street from the Bauers' apartment for the purpose of an identification. A dome light was on in the car and further illumination was provided by a vapor light in the lot. Frank and his mother, accompanied by several police officers, walked over and viewed the petitioner at a distance of about 25 feet while he was still in the car. Frank identified Mr. Whitty as his assailant and stated that he was 100% sure of the identification. Frank later made several in-court identifications of the petitioner.

In Neil v. Biggers, 409 U.S. 188 (1972), the Court held that even when an out-of-court identification is unnecessarily suggestive, a defendant is not denied due process when "under the totality of the circumstances the identification was reliable." Id. at 199. The Court went on to suggest the factors to be considered in evaluating the likelihood of misidentification: (1) the opportunity of the wit-

ness to view the criminal at the time of the crime, (2) the witness' degree of attention, (3) the accuracy of the witness' prior description of the criminal, (4) the level of certainty demonstrated by the witness at the confrontation, and (5) the length of time between the crime and the confrontation. Id. at 199-200.

In its decision dealing with the appeal in this case, the Wisconsin court of appeals considered the issue presently before the court. I am in agreement with that court's application of the *Biggers* criteria to the facts of this case:

> "The reliability of the identification is established when the factors set forth in *Biggers* are considered. Frank had a good opportunity to view the attacker in his room at close range, under adequate lighting, for a period of 15 to 30 minutes. Furthermore, as the victim of a sexual assault, the boy viewed his assailant with a higher degree of attention than a disinterested witness or a mere bystander would have. And although no physical description was given, none was needed. The boy was able to identify Whitty by name as a person he had often seen and talked to in his neighborhood. We deem the fact that Frank initially identified his attacker as Tom Woody, rather than Tom Whitty, to be insignificant given his statement that he was 100% certain that Whitty was his attacker when he identified him in the parking lot only three hours after the assault."

Since under the toality of the circumstances the out-of-court identification of the petitioner was reliable, his petition for a writ of habeas corpus will be denied.

Therefore, IT IS ORDERED that the petition of Thomas Whitty for a writ of habeas corpus be and hereby is denied.

Dated at Milwaukee, Wisconsin, this 19 day of September, 1979.

/s/ Myron L. Gordon
U. S. District Judge

Office-Supreme Court, U.S.
FILED
JUN 19 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-1974

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

THOMAS WHITTY,
Petitioner,

v.

THOMAS R. ISRAEL, Warden, State Prison of Waupun, Wisconsin; and the ATTORNEY GENERAL of the State of Wisconsin,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF RESPONDENTS

BRONSON C. LA FOLLETTE
Attorney General of Wisconsin

KIRBIE KNUTSON
Assistant Attorney General of Wisconsin

Attorneys for Respondents.

Post Office Address:

Post Office Box 7857
Madison, Wisconsin 53707

Telephone: (608) 266-8908

TABLE OF CONTENTS

Page

STATEMENT OF THE CASE 1

SUMMARY OF ARGUMENT 4

ARGUMENT 4

The Court Of Appeals, Deciding A Federal Constitutional Question In A Way Consistent With Applicable Decisions Of This Court, Correctly Found That The Identification Of Petitioner Was Reliable 4

CONCLUSION 8

TABLE OF AUTHORITIES

Cases Cited

Ghiz v. Bordenkircher,
519 F.2d 759 (4th Cir. 1975),
cert. denied, 424 U.S. 944 (1976) 6

Manson v. Brathwaite,
432 U.S. 98 (1977) 4,5,7

McGuff v. Alabama,
566 F.2d 939 (5th Cir. 1978) 6

Neely v. State,
97 Wis. 2d 38, 292
N.W.2d 859 (1980) 7

Neil v. Biggers,
409 U.S. 188 (1972) 4,5

Pruitt v. Hutto,
574 F.2d 956 (8th Cir.), cert. denied,
439 U.S. 870 (1978) 6

Page

Sumner v. Mata,
446 U.S. 1302, 100 S.Ct.
1630 (1980) 4

United States v. Anderson,
490 F. 2d 785
(D.C. Cir. 1974) 6

United States v. Beckham,
505 F.2d 1316 (5th Cir.),
cert. denied, 421 U.S.
950 (1975) 6

Watkins v. Sowders,
— U.S. —, 101 S. Ct. 654 (1981) 4

No. 80-1974

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

THOMAS WHITTY,
Petitioner,

v.

THOMAS R. ISRAEL, Warden, State Prison of Waupun, Wisconsin; and the ATTORNEY GENERAL of the State of Wisconsin,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF RESPONDENTS

STATEMENT OF THE CASE

The petitioner, Thomas Whitty, was convicted following a jury trial of first-degree sexual assault and burglary. Whitty denied the occurrence of the incident upon which the charges were based (Trial Transcript [hereinafter "T.T."]:244).

According to Frank Bauer, the eleven-year-old victim of the assault, on the night of April 9, 1977, he awoke to find Whitty sitting or kneeling beside his bed (T.T.:92, 99). Whitty asked Frank whether there was any money in the house and whether anyone else was there (T.T.:100). Frank answered no to both questions

and Whitty threatened to kill him if he was lying (*id.*). Whitty shoved his finger, which he said was a gun and a knife, into Frank's neck, saying, "I'll kill you, I'll kill you" (*id.*).

Whitty asked Frank if he could kiss him and suck him and, despite the boy's refusal, Whitty kissed Frank on the mouth and performed fellatio on him (T.T.:101). Whitty was in Frank's room for fifteen to thirty minutes (T.T.:102). No light was turned on in the room, but Frank could see his assailant by the light which entered the room from a large vapor light in the parking lot outside (T.T.:98, 115, 82-83). Frank was fully awake while Whitty was in his room (T.T.:118).

Before the evening of the assault, Frank had seen Whitty ten to twenty times and had talked to him ten to fifteen times (T.T.:91, 92). Most of their conversations occurred either at a go-kart track which Whitty sometimes managed and which Frank patronized or at the grocery store where Whitty worked (T.T.:92, 93). Once Frank encountered Whitty in the woods and, at Whitty's invitation, went to Whitty's house to look at coins (T.T.:92, 94-95). Whitty acknowledged that these contacts had occurred (T.T.: 260, 261). Frank knew that Whitty's first name was Tom and had noticed that Whitty spoke with a lisp (T.T.:95). Frank's sister Lisa had told him that Whitty had made sexual remarks to other children and that Whitty was "queer," but Whitty had never made any sexual proposals to Frank (T.T.:110, 111).

On the evening of the assault, Frank's mother came home at 11:30 P.M. (T.T.:47). When Frank told her about the sexual assault she called the police (T.T.:52). The police arrived at Bauers' by 11:50 P.M. (T.T.:184).

Frank told the police that he had been assaulted by "Tom Woody" who lived down by the go-kart track

(T.T.:165, 189). Frank's sister Susan said, "Oh, you mean Mr. Whitty," and Frank agreed that Whitty was the correct name (T.T.:189, 165, 152, 156, 140, 143, 130).

The police then went to Whitty's house and spent between thirty minutes and an hour talking with him (T.T.:193, 216). They told Whitty what had occurred at Bauers', but did not arrest him. The police suggested that the matter could be cleared up that night by having the boy attempt to identify Whitty (T.T.:217, 194). Whitty agreed to the confrontation (T.T.:195, 217, 270).

Whitty lived on a street four hundred yards from Frank's house (T.T.:215). The police took Whitty in a squad car to a parking lot near Frank's house where Frank viewed Whitty when Whitty was in the squad car (T.T.:220). The light was on in the car and a vapor light illuminated the parking lot (T.T.:105). Frank identified Whitty as the man who assaulted him, saying he was one hundred percent certain of the identification (T.T.:105, 220). The identification took place at approximately 2:20 A.M. (T.T.:131), three hours after Whitty had left Frank's bedroom (T.T.:47, 52).

At trial, Frank made two in-court identifications of Whitty (T.T.:91, 103).

Whitty acknowledged that he was in the bar beneath the Bauers' apartment the night of the assault, but denied being in the apartment or assaulting Frank (T.T.:244). Whitty testified that he left the bar briefly to get some fresh air (T.T.:268).

SUMMARY OF ARGUMENT

When evaluated according to the criteria established by earlier decisions of this Court, the identification of the petitioner by the boy he sexually assaulted was reliable and was properly admitted into evidence. The victim had an opportunity to observe the petitioner closely, he recognized the petitioner as an acquaintance, and he was certain of the identification.

ARGUMENT

The Court Of Appeals, Deciding A Federal Constitutional Question In A Way Consistent With Applicable Decisions Of This Court, Correctly Found That The Identification Of Petitioner Was Reliable.

The petitioner asserts that the identification procedure used in this case was unnecessarily suggestive and that the resultant identification was unreliable. The court of appeals assumed that the show-up was suggestive, but concluded that the identification was reliable.

The use of a suggestive identification procedure does not preclude the admission of reliable identification evidence. *Watkins v. Sowders*, — U.S. —, 101 S. Ct. 654, 658 (1981); *Sumner v. Mata*, 446 U.S. 1302, 100 S. Ct. 1630, 1631-32 (1980); *Manson v. Brathwaite*, 432 U.S. 98, 114 (1977); *Neil v. Biggers*, 409 U.S. 188, 198 (1972). To determine whether an identification is reliable, a court considers the following elements:

1. the witness' opportunity to view the criminal while the crime occurred;

2. the witness' degree of attention to the criminal;

3. the accuracy of any description the witness gave before the confrontation;

4. the witness' level of certainty regarding any identification made at the confrontation;

5. the amount of time which elapsed between the crime and the confrontation.

Neil, 409 U.S. at 199; *Manson,* 432 U.S. at 114. Applying the *Neil* analysis, the court of appeals concluded that Frank's identification of Whitty was reliable.

1. *Opportunity to view the assailant.* There was sufficient light from the vapor light outside the window to permit Frank to see Whitty. Whitty was in the room between fifteen and thirty minutes, long enough to permit a close study of his features. Identifications based on observations of only a few minutes have been found reliable. *See, e.g., Manson,* 432 U.S. at 100-01. Frank had a chance to observe Whitty at close range when Whitty kissed him on the mouth.

2. *Degree of attention.* Although Frank was asleep when Whitty entered, he became completely alert during the course of the assault (T.T.:118). Frank obviously scrutinized his assailant more closely than would a witness who just happened to be in the vicinity of a crime. His situation was analogous to that of the rape victim in *Neil:*

> [He] was no casual observer, but rather the victim of one of the most personally humiliating of all crimes.

409 U.S. at 200 (footnote omitted).

3. *Accuracy of description.* Frank did not need to describe the assailant's physical traits since he knew the man who entered his room and could identify him

by name. Frank told the police not only Whitty's name, which he mispronounced slightly (T.T.:165), but where Whitty lived (T.T.:189).[1]/ The court of appeals noted that Frank's offering the name enhanced the reliability of the identification. He used the correct first name and said the last name was "Woody," a name very similar to petitioner's (Petitioner's Appendix:4).

The reliability of the identification is enhanced when the one identified is known to the victim. Frank had seen and talked to Whitty on many occasions. One can be more certain of identifying someone he or she recognizes than of correctly remembering a new face. *See Ghiz v. Bordenkircher*, 519 F.2d 759, 762 (4th Cir. 1975), *cert. denied*, 424 U.S. 944 (1976); *United States v. Beckham*, 505 F.2d 1316, 1319 (5th Cir.), *cert. denied*, 421 U.S. 950 (1975); *United States v. Anderson*, 490 F.2d 785, 787 (D.C. Cir. 1974).

4. *Level of certainty.* During the confrontation Frank assured the police that he was one hundred percent certain that Whitty was the man who attacked him. He displayed no hesitation in making the identification. *Cf. McGuff v. Alabama*, 566 F.2d 939, 941 (5th Cir. 1978).

5. *Time between crime and confrontation.* The confrontation took place within three hours of the assault when Frank's memory was at its freshest.

Frank Bauer's identification of Whitty was reliable and was properly admitted into evidence. Frank had an opportunity to observe his assailant for an extended period in a situation which compelled his attention. He confronted the petitioner within a few

---

1/*Cf. Pruitt v. Hutto*, 574 F.2d 956, 957 (8th Cir.), *cert. denied*, 439 U.S. 870 (1978), where an eight-year-old girl was found to have reliably identified her brother-in-law as the man who raped her. The girl identified him both to her mother and to the prosecutor only by his family nickname.

hours of the crime and identified him with absolute certainty.

Authorizing the showing of a reliable independent basis for the identification limits "the societal cos's imposed by a sanction that excludes relevant evidence from consideration and evaluation by the trier of fact." *Manson*, 432 U.S. at 110. "Juries are not so susceptible that they cannot measure intelligently the weight of identification testimony that has some questionable feature." *Id.*, at 116.[2]/ Frank's identifications of Whitty were demonstrably reliable. Whitty was not denied due process by the admission into evidence of Frank Bauer's out-of-court and in-court identifications.

---

[2]/ The petitioner complains that the trial court failed to give the jury a special instruction regarding identification evidence. There is no indication in the trial transcript that the petitioner either requested such an instruction or objected to the trial court's not having given it *sua sponte*. Under Wisconsin law, any objection to the absence of an instruction on identification evidence was therefore waived. *Neely v. State*, 97 Wis. 2d 38, 55, 292 N.W.2d 859, 869 (1980).

Further, the petitioner never attempted to raise this alleged error in the state courts or in the federal district court. It was raised for the first time in petitioner's statement on the need for oral argument in the Seventh Circuit Court of Appeals.

The identification here was inherently reliable and the jury was instructed that it must acquit the petitioner unless it found him guilty beyond a reasonable doubt. An instruction on identification could not have affected the outcome of the case.

CONCLUSION

The respondents respectfully request this Court to deny the petition for writ of certiorari.

Respectfully submitted,

BRONSON C. LA FOLLETTE
Attorney General of Wisconsin

KIRBIE KNUTSON
Assistant Attorney General of Wisconsin

Attorneys for Respondents.

Post Office Address:

Post Office Box 7857
Madison, Wisconsin 53707

Telephone: (608) 266-8908